No. 3995

United States

Circuit Court of Appeals

For the Ninth Circuit.

HENRY S. FLEMING,

Appellant,

vs.

MONTANA COAL & IRON COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Solicitors of Record.

GEORGE F. SHELTON, Esq., Butte, Montana,
Solicitor for Plaintiff and Appellant.

Messrs. JOHNSTON, COLEMAN & JOHNSTON,
Billings, Montana,
Solicitors for Defendant and Appellee.
[1*]

In the District Court of the United States in and for the District of Montana.

IN EQUITY—No. 250.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on November 28th, 1922, the plaintiff filed his bill of complaint herein, in the words and figures following, to wit: [2]

In the District Court of the United States for the District of Montana, Butte Division.

IN EQUITY—No. ——.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY, a Corporation,

Defendant.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Bill of Complaint.

To the Honorable the Judge of the District Court of the United States in and for the District of Montana.

The plaintiff above named, Henry S. Fleming, a citizen and resident of the State of New York, suing on behalf of himself and all other persons similarly situated, who may come in and join the plaintiff in the prosecution of this suit, and share in the expense thereof, by Folger & Rockwood and George F. Shelton, his attorneys, brings this, his Bill of Complaint, against Montana Coal & Iron Company, a corporation, organized and existing under and by virtue of the laws of the State of Montana and a citizen of said state.

And thereupon the plaintiff complains and alleges:

FIRST: That the plaintiff Henry S. Fleming, at all of the times hereinafter named was and still is a citizen of the State of New York and a resident thereof.

SECOND: That the defendant, Montana Coal & Iron Company, was at all of the times hereinafter named and still is, a corporation, organized and existing under and by virtue of the laws of the State of Montana and doing business in said State and a citizen and resident thereof.

THIRD: That the plaintiff Henry S. Fleming, at all of the times herein mentioned has been and still is the owner and holder of four certain bonds of the defendant company, each given to secure the

sum of one thousand dollars ($1,000.00) with interest according to its terms, the aggregating amount of said bonds, owned by the said plaintiff is the sum of four thousand dollars ($4,000.00) par value with interest as aforesaid. [3]

FOURTH: That the bonds of the defendant company so held by this plaintiff as aforesaid were issued under and by virtue of the terms of a certain mortgage, made by the defendant company to Empire Trust Company, as Trustee, bearing date the 2d day of January, 1912, and thereafter duly recorded in the office of the Clerk and recorder of the County of Carbon, State of Montana, on the —— day of ——, 1912.

FIFTH: That the aforesaid mortgage contained a provision that the real estate covered by the same should be held by the Trustee:

> "IN TRUST, NEVERTHELESS, for the equal *pro rata* benefit and security of all the holders of any of the above mentioned bonds and coupons at what period soever the same may be issued, without any preference or priority of one bond over another, except as hereinafter mentioned, and for the uses and purposes, and on the conditions, covenants and restrictions herein declared and expressed."

SIXTH: That the aforesaid mortgage creates a sinking fund for the benefit and security of the bonds issued under the Indenture of Mortgage, to be maintained by the setting aside of a specific sum of money for each ton of coal and provides further that when the sums of money so set aside

should aggregate a stated amount, the Trustee is required to advertise for written proposals to sell to it outstanding bonds to be purchased with such moneys and if no bonds are then offered or the purchase price of those offered is in excess of a stated price or does not consume the whole amount in such sinking fund then the Trustee is required to redeem with such sinking fund moneys at the redemption price such bonds as are determined by lot.

SEVENTH: Such indenture of mortgage likewise provided (paragraph 29) as follows:

> "IT IS FURTHER COVENANTED, PROMISED AND AGREED THAT AT ANY TIME HEREAFTER and prior to the time when the principal sum secured by the said bonds shall become due, the Company may make a call for the redemption of the whole or any part of said issue of bonds then outstanding in the manner and with the effect hereinafter stated.
>
> The bonds to be redeemed under such call shall be determined by lot by placing pieces of paper of equal size and appearance and equal in number to the bonds outstanding, with numbers on them respectively corresponding to the numbers of the respective bonds outstanding, in a wheel or box, and after properly and thoroughly commingling the same, such pieces of paper shall be drawn out, one at a time by a person appointed for that purpose by resolution of the Board of Trustees of the Company, until sufficient amount of the bonds

represented thereby shall have been drawn to equal the amount at their par value of the bonds called for redemption, with accrued interest to date of call, plus the amount of premium required to be paid upon the same. The Company shall thereupon give notice by public advertisement in one newspaper published in the City of Billings, Montana, and one newspaper published in the City of New York, daily for one week, the last publication [4] to be finished at least thirty days before the date fixed for said redemption, and also that said bonds have under the provisions of the mortgage been determined by lot as bonds to be redeemed by the Company, at the time and place mentioned in the said notice. Said notice so published shall further state that the bonds are called for redemption at a place in the City of New York therein mentioned, at a date and hour therein mentioned, not less than thirty days nor more than two months from the date of the last publication, at which time and place said company shall redeem said bonds by paying the principal and accrued interest due thereon to date of actual redemption, plus a five (5) per cent premium on the amount of the par value of principal thereof. * * *

EIGHTH: That heretofore and prior to the commencement of this action the defendant corporation through its officers and trustees, expended large sums of money of the defendant company in

the purchase of bonds issued under and pursuant to the aforesaid Indenture of Mortgage, which sums amount to at least one hundred thirty-eight *thousand* ($138,000.00); that such moneys were not placed to the credit of the sinking fund and disbursed by the trustee herein according to the terms of said Indenture of Mortgage, but were used by the officers and trustees of, and by the defendant company in the purchase of bonds at private sale, without advertisement for bids, and without in other ways complying with the terms of said Indenture of Mortgage; that no call has been made by the defendant company for the redemption of the whole or any part of such issue of bonds outstanding and the bonds so purchased by the defendant company, its officers and trustees, have been, in fact, cancelled and were purchased for the sole purpose of redemption thereof.

NINTH: That as a holder of four of the bonds issued under such mortgage the plaintiff above named was and is entitled to an opportunity to have his bonds selected for redemption at the premium of five per cent as provided in said mortgage; and by reason of the acts of the company and its officers and trustees in authorizing the purchase of and in purchasing for redemption bonds selected in a way other than as provided in said mortgage this plaintiff has been damaged and will continue to suffer irreparable damage if such action is permitted to continue on the part of the defendant company, its officers and trustees.

TENTH: That the defendant company, its officers and trustees have now appropriated to the purchase of bonds in the unlawful and improper method hereinabove referred to, further large sums of money which the defendant company, its officers and trustees are about to illegally and improperly expend, and unless restrained from such further acts this plaintiff will suffer additional irreparable injury. [5]

ELEVENTH: That the defendant company, its officers and trustees, threaten to further appropriate and use for the purchase of bonds in the unlawful and improper method hereinbefore referred to, further large sums of money and the said defendant Company and its officers and trustees are about to illegally and improperly spend additional large amounts of money in unlawful and improper methods above referred to and thereby the injury and damage to the plaintiff, thus threatened will become irreparable; that the plaintiff has no plain speedy or adequate remedy at law, all of which acts and doings are contrary to equity and good conscience and tend to the manifest injury of the plaintiff in the premises.

That the matter in controversy in this suit exceeds exclusive of interest and costs the sum or value of three thousand dollars ($3,000.00).

Forasmuch as the plaintiff can have no adequate relief, except in this court, and to the end, therefore, that the defendant, Montana Coal & Iron Company, may, if they can, show why the plaintiff should not have the relief hereby prayed, and may

make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And that the defendant may be decreed to account for and pay over the profits thus unlawfully derived from the violation of the plaintiff's rights and be restrained from any further violation of said rights, plaintiff prays that your Honor may grant a writ of injunction, issuing out of and under the seal of this Honorable Court, perpetually enjoining and restraining the said defendant company, its officers, trustees and agents and employees, from using the funds of the corporation in the purchase of outstanding bonds, issued under the Indenture of Trust and Mortgage made and executed by the defendant to Empire Trust Company, under date of January 2d, 1912, except according to the terms, conditions and provisions set forth and contained in said mortgage, together with the costs and disbursements of this action. [6]

And that your Honor upon the rendering of the decree above prayed may assess or cause to be assessed, in addition to the profits to be accounted for by the defendant as aforesaid, the damage plaintiff has sustained by reason of such violation of his rights as aforesaid.

And plaintiff further prays that a provisional or preliminary injunction be issued restraining the

said defendant from any further violation of the rights of said plaintiff, pending this cause and for such other and further relief as the Equity of the case may require and to your Honor may seem meet.

May it please your Honor to grant unto the plaintiff, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said Montana Coal & Iron Company commanding it on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

GEORGE F. SHELTON,
FOLGER & ROCKWOOD,
Attorneys for Plaintiff and of Counsel. [7]

United States of America,
State of New York,
County of New York,—ss.

Henry S. Fleming, being first duly sworn, deposes and says, that he is the plaintiff above named; that he has read the foregoing complaint and knows the contents thereof, and that as to the matters and things therein set forth, the same is true of his own knowledge.

HENRY S. FLEMING.

Subscribed and sworn to before me this 23d day of November, 1922.

CATHERINE TAGUE,
Notary Public.

My commission expires March 30, 1922. [8]

No. 26631, Series B.—Form 1.

State of New York,
County of New York,—ss.

I, James A. Donegan, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That Catherine Tague, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a notary public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 24th day of November, 1922.

[Seal] JAMES A. DONEGAN,
Clerk.

Complaint. Filed Nov. 28, 1922. C. R. Garlow, Clerk. [9]

THEREAFTER, on December 27, 1922, plaintiff filed herein his motion for injunction *pendente lite,* with affidavit of service, which motion and affidavit is in the words and figures following, to wit: [10]

In the District Court of the United States in and for the District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY,

Defendant.

Motion for Injunction Pendente Lite.

To Johnston, Coleman & Johnston, Attorneys for Defendant.

You will please take notice that the plaintiff on the 4th day of January, 1923, at the hour of 10 o'clock A. M., on said date, at the courtroom in the Federal Building, at Helena, Montana, will apply to the Court for an injunction *pendente lite,* in accordance with the prayer of the complaint.

The application will be made upon the verified complaint of the plaintiff and upon the affidavit of Henry S. Fleming, a copy of which is herewith served upon you.

GEORGE F. SHELTON,
FOLGER & ROCKWOOD,
Attorneys for Plaintiff. [11]

In the District Court of the United States in and for the District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY,

Defendant.

Notice of Service of Affidavit.

State of Montana,
County of Silver Bow,—ss.

George F. Shelton, being first duly sworn, deposes and says that he is a citizen of the State of Montana, and a resident of Silver Bow County, Montana, over 21 years of age; that he served the attached notice and the affidavit of Henry S. Fleming, also hereto attached, on Johnston, Coleman & Johnston, attorneys for the defendant, on the 27th day of December, 1922, by depositing in the United States Postoffice, at Butte, Montana, on said 27th day of December, 1922, a sealed envelope, which said sealed envelope contained a copy of said notice and of said affidavit, and had affixed thereto the requisite amount of United States postage stamps, to entitle the same to be carried by the United States Mails, which said envelope was addressed to Johnston, Coleman & Johnston, Billings, Montana, and further affiant sayeth not.

GEORGE F. SHELTON.

Subscribed and sworn to before me this 27th day of December, 1922.

[Seal] L. D. BARRY,

Notary Public for the State of Montana residing at Butte, Montana.

My commission expires Dec. 8, 1925.

Filed December 27, 1922. C. R. Garlow, Clerk. [12]

THEREAFTER, on December 27, 1922, the plaintiff Henry S. Fleming filed his affidavit herein on application for a preliminary injunction, which affidavit is in the words and figures following, to wit: [13]

In the District Court of the United States in and for the District of Montana, Butte Division.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY, a Corporation,

Defendant.

Affidavit of Henry S. Fleming on Application for Preliminary Injunction.

United States of America,
State of New York,
County of New York,—ss.

Henry S. Fleming, being first duly sworn, deposes and says:

That he is the plaintiff named in the above-

entitled suit, that he is a citizen and resident of the State of New York, and is of the age of 59 years; that he is the owner and holder of four certain bonds of the defendant company, each given to secure the sum of one thousand dollars ($1,000.00), with interest according to its terms; that the said bonds are numbered as follows:

537–538–539–540

That he acquired said bonds on the 7th day of October, 1913, and has been owner and holder of the same from the said date of said acquisition; that said bonds so owned and held by affiant, were issued under the terms of a certain mortgage, made by the defendant company to Empire Trust Company, as trustee; bearing date of the 2d day of January, 1912, and thereafter duly recorded in the office of the Clerk & Recorder of the County of Carbon, State of Montana, on the 11th day of November, 1912, in Book 15, Page 490.

That the said mortgage contained a provision that the real estate covered by the same, should be held by the Trustee

> "IN TRUST NEVERTHELESS, for the equal *pro rata* benefit and security of all the holders of any of the above mentioned bonds and coupons at what period soever the same may be issued, without any preference or priority of one bond over another, except as hereinafter mentioned, and [14] for the uses and purposes and on the conditions, covenants and restrictions herein declared and expressed."

That said mortgage contained a clause and provision as follows, to wit:

The Company hereby creates and at all times will maintain a sinking fund for the benefit and security of the bonds issued and to be issued under this indenture, by paying to the Trustee within thirty days after the second day of July and January of each year, beginning with the second day of January, 1914, and thereafter, and until all the bonds issued and to be issued under this indenture are fully paid and canceled, an amount which for and during the period of three years ending January 2d, 1917, shall equal the sum of two cents, and which thereafter for and during the period of ten years ending January 2d, 1927, shall equal the sum of three cents, and which thereafter for and during the period of ten years ending January 2d, 1937, shall equal the sum of four cents, and which thereafter and so long as any of the bonds hereby secured may be outstanding, shall equal the sum of five cents, in each instance for and in respect of each and every ton of two thousand two hundred and forty pounds of run of mine coal mined or taken during the preceding period of six months ending on each second day of January or July (as the case may be), from any of the property at the time of such mining or taking subject to this indenture or provided or agreed to be subject or subjected thereto, whether the property from which such coal is mined or taken is held in fee or under lease by the Coal Company, or any subsidiary company or by others under leases or other instruments heretofore

or hereafter executed by either of them or in any other manner, and by whomsoever said coal may be mined or taken. All payments into the sinking fund in this article 12 provided for shall be disposed of and applied solely as in this article of this indenture specified and provided.

Any and all funds at any time paid into or becoming a part of the sinking fund mentioned in this article 12 of this indenture shall by the Trustee, upon receipt thereof, be applied as follows:

Whenever the amount paid into or then in the said sinking fund shall amount to $10,000 or more the Trustee shall, by notice to be [15] published once a week for two successive weeks in a daily newspaper of general circulation, published in the borough of Manhattan in the City of New York, and in the City of Billings, State of Montana, advertise for written proposals to sell to it bonds secured hereby and then outstanding, and the Trustee to the extent of the funds then in its hands available therefor, shall purchase the bonds offered to it at the lowest price asked therefor, such purchase to be made at the office of the Trustee in the City of New York, upon surrender of the bonds with all unpaid coupons pertaining thereto, on the semi-annual interest date next following such publication, and the Trustee shall give to the owner or owners of the bonds whose proposals may be accepted such notice of such acceptance as to the Trustee may seem reasonable. In the event that two or more proposals are for the sale of bonds at identical amounts, being lower than the amounts asked in the

other tenders received by the Trustee, such proposals shall be accepted in *pro rata* proportions; provided however that no purchase shall be made by the Trustee at a rate exceeding one hundred and five per cent of the principal of the bonds with all the interest accrued upon the said principal and unpaid at the time fixed for the consummation of such purchase. If upon any such advertisement being made, no proposals to sell bonds at or below the price aforesaid shall be made, or if such proposals made shall not be sufficient to exhaust the moneys held on deposit as aforesaid, then the amount of said funds not required for the purchase of bonds proposed to be sold at or below the price aforesaid shall be applied subject to the divisions of the bonds and in the manner in this article specified, to the redemption of bonds secured hereby and then outstanding at the rate of one hundred and five per centum of the principal thereof with all interest accrued upon the said principal and unpaid at the time fixed for such redemption; and to the extent of said funds applicable to redemption the Trustee shall draw or cause to be drawn by lot from a closed box containing all of the numbers of the whole number of the bonds outstanding under this indenture at the date of such drawing the serial numbers of the bonds to be redeemed. In making any such drawing the serial numbers of the then outstanding coupon bonds shall be collectively used. [16]

The moneys of the sinking fund shall be used by the Trustee in the purchase of bonds secured hereby

at not exceeding 105 per centum of their par value and accrued interest, or in the redemption of bonds at said maximum price.

All bonds purchased or redeemed, as in this article provided, shall, with the coupons thereto attached, be cancelled by the Trustee and destroyed, excepting in so far as retention of the same as vouchers may be deemed expedient. And if destroyed a partial satisfaction piece shall be executed and delivered to the Company up to the amount of the debt so paid off.

Which said mortgage also contained the following provisions:

It is further covenanted, promised and agreed that at any time hereafter and prior to the time when the principal sum secured by the said bonds shall become due, the Company may make a call for the redemption of the whole or any part of said issue of bonds then outstanding in the manner and with the effect hereinafter stated.

The bonds to be redeemed under such call shall be determined by lot by placing pieces of paper of equal size and appearance and equal in number to the bonds outstanding, with numbers on them respectively corresponding to the numbers of the respective bonds outstanding, in a wheel or box, and after properly and thoroughly commingling the same, such pieces of paper shall be drawn out, one at a time, by a person appointed for that purpose by resolution of the Board of Trustees of the Company, until sufficient amount of the bonds represented thereby shall have been drawn to equal the

amount at their par value of the bonds called for redemption, with accrued interest to date of call, plus the amount of premium required to be paid upon the same. The Company shall thereupon give notice by public advertisement in one newspaper published in the City of Billings, Montana, and one *news* published in the City of New York, daily for one week, the last publication to be finished at least thirty days before the date fixed for said redemption, and any such advertisement shall state the number and par value of the bonds so drawn for redemption, and also that said bonds have under the provisions of the mortgage been determined by lot as bonds to be redeemed by the Company, at the time and place [17] mentioned in the said notice. Said notice so published shall further state that the said bonds are called for redemption at a place in the City of New York therein mentioned, at a date and hour therein mentioned, not less than thirty days nor more than two months from the date of the last publication, at which time and place said Company shall redeem said bonds by paying the principal and accrued interest due thereon to date of actual redemption, plus a five (5) per cent premium on the amount of the par value of principal thereof.

In case any of said bonds, so called, shall be registered, a notice of a similar nature shall be mailed to the registered owner thereof to his last address left with the Company; always provided, that such notice shall be mailed not less than one

month prior to the time mentioned therein for the redemption of said bonds.

The publication of such notice shall be conclusive proof as between the parties of the receipt of said notice of call for redemption and in like manner the deposit of said notice in the postoffice, properly inclosed in a post paid wrapper, addressed to the known address given by the said registered bondholder to the Company, shall be conclusive evidence as between the parties of the receipt of such notice, and the affidavit of the printer as to publication and (or) of the person or persons so depositing the said notice in any postoffice shall, as between the parties, constitute *prima facie* sufficient and satisfactory proof of the actual publication (and) or mailing, as the case may be, of the said notice as required by this covenant, and of the receipt of the same, so as to fix and determine the rights of the parties hereunder.

From and after the date mentioned for redemption and payment in such notice of call, in case such bonds so called are not presented for payment, or being presented are paid, interest upon the bonds so called shall cease and the coupons attached or belonging to the same growing due thereafter shall be and become cancelled, null and void. Upon the presentation for payment of the bonds mentioned in the call, together with all coupons not yet paid thereon, the Company shall redeem the same by the payment of the principal and interest due thereon, together with a five (5) per cent premium on the amount of the par value of the principal sum se-

cured thereby, and in case any [18] of said bonds so called are not so presented, the Company may, at its option, forfeit the right of said bonds or bonds to be redeemed under said call, leaving them in the same position as though not yet called, or it may hold the amounts so set apart for its other redemption, or may invest the same in such securities as said Company in its absolute discretion and judgment may approve at the sole risk of and for the benefit of such bondholder or bondholders until the same shall be called for.

In case of the presentation of any bond or bonds from which the interest coupons not yet paid or any part of them have been detached, or are not presented with the bond to which they belong, the amount of such detached or unpresented and unpaid coupon or coupons from such bond or bonds shall be deducted from the amount due and paid on the said bond or bonds at the time so fixed for redemption of the same by said publication or notice of call.

That heretofore and prior to the commencement of this action, the defendant corporation through its officers and trustees, expended large sums of money of the defendant company in the purchase of bonds issued under and pursuant to the aforesaid Indenture of Mortgage, which sums amount to at least one hundred thirty-eight *thousand* ($138,000.00); that such moneys were not placed to the credit of the sinking fund and disbursed by the trustee herein according to the terms of said Indenture of Mortgage, but were used by the officers and trustees of, and by the defendant company in the purchase of

bonds at private sale, without advertisement for bids, and without in other ways complying with the terms of said Indenture of Mortgage; that no call has been made by the defendant company for the redemption of the whole or any part of such issue of bonds outstanding and the bonds so purchased by the defendant company, its officers and trustees, have been, in fact, cancelled and were purchased for the sole purpose of redemption thereof.

That affiant as the owner and holder of four of the bonds issued under such mortgage above named, was and is entitled to the privilege to have his bonds selected for redemption at a premium of five (5) per cent, as provided in the said mortgage, but that the said defendant company and its officers and trustees, in authorizing the purchase of, [19] and in purchasing for redemption, bonds selected in a way other than provided in said mortgage, have damaged this plaintiff and deprived him of his right in the premises.

That the said defendant company and its officers and trustees have heretofore from time to time, purchased and retired of the corporate bonds of the company amounts aggregating at par value one hundred thirty-eight thousand ($138,000.00) Dollars; that the said bonds so purchased and retired by the said company and its officers were purchased and retired without the consent of affiant and in violation of and contrary to the provisions of the paragraphs of the said mortgage above quoted; that on the 21st day of October, 1920, at a meeting of the trustees of the said defendant company, a resolution was adopted as follows, to wit:

"RESOLVED, that at the time of the next payment of the sinking fund requirement to the Empire Trust Company of New York City, the general manager cause to be paid to said Trust Company the additional sum of twenty thousand dollars ($20,000.00) and that he direct the Trust Company to use and disburse the same in the purchase and retirement of the outstanding bonds of this company at a price not exceeding the par value thereof."

That on the 28th day of February, 1921, at a meeting of the Trustees of said defendant company, the following resolution was adopted, to wit:

"AND BE IT FURTHER RESOLVED, that the managing officers of the company be directed to set aside and to apply during the year 1921, to the purchase and retirement of the outstanding corporate bonds of the company, at a price not in excess of the par value thereof, an amount of money which, with the payments made into the sinking fund for such purpose, shall total in all the sum of Sixty Thousand dollars ($60,000.00)."

And that on the 20th day of January, 1922, at a meeting of the trustees of said defendant company, the following resolution was adopted, to wit:

"BE IT FURTHER RESOLVED, that the Vice-President of the company be and he is hereby authorized and directed to apply not to exceed the sum of Thirty Thousand Dollars ($30,000.00) to the purchase and retirement of the outstanding bonds of the company, offered at par or less, to the Empire Trust Company of New York City."

That on the 13th day of June, 1922, at a meeting of the trustees of [20] said defendant company the following resolution was adopted, to wit:

"RESOLVED, that the President and Vice-President be and they hereby are requested and directed to continue the policy of expending, when to them it seems desirable to do so, sums of money approximately equal in amount to the sums distributed as dividends to stockholders in the purchase and retirement, if any, of the outstanding bonds of this company, providing the same may be acquired at par or less."

And thereupon at said meeting on the 13th day of June, 1922, the vice-president reported to the Board of Directors that acting under the authority given to them by the stockholders and directors, the officers of the company had heretofore purchased and acquired and caused to be retired of the corporate bonds of the company, amounts aggregating $138,000.00 in par value. A minute of such report being incorporated in the minutes of the meeting as follows:

"The Vice-President reported to the Board of Directors that acting under the authority given to them by the stockholders and directors, the officers of the company had heretofore purchased and acquired and caused to be retired of the corporate bonds of the company amounts aggregating $138,000 in par value."

Thereupon and at said meeting the following resolution was adopted:

"RESOLVED, that all and singular the acts of the officers of this company in purchasing and retiring its outstanding bonds as reported, by the Vice-President, be and the same hereby is ratified, approved of and confirmed."

And affiant further says, that in the annual report of the President to the stockholders, which report was incorporated in the "minutes of the annual meeting" of the stockholders of said defendant corporation, held on the 13th of June, 1922, he made the following statement to the stockholders:

"Of the outstanding bonds of the company Forty-one Thousand Dollars ($41,000.00), par value, were paid and retired during the year, leaving unpaid of said bonds Two Hundred Eighty-seven Thousand Five Hundred Dollars ($287,500.00). We expect to have Fifty Thousand Dollars ($50,000.00) available during the present year to be used in purchasing and retiring bonds, providing that the bonds may be purchased without paying any premium." [21]

And which said statement was adopted and ratified at the meeting of the trustees held on said date.

That affiant has demanded of the said defendant corporation and of its officers that it rescind its illegal and unlawful action in the purchase of said bonds contrary to the provisions of the said mortgage and that it cease its unlawful conduct in connection therewith; that the said defendant corporation and its officers have neglected and refused to comply with the demand of the said affiant and have threatened and still threaten to continue said illegal

practices contrary to the rights of affiant as holder of said bonds against his will and to his irreparable damage in the premises.

And further affiant sayeth not.

HENRY S. FLEMING.

Subscribed and sworn to before me this 23d day of November, 1922.

[Seal] CATHERINE TAGUE,
Notary Public, New York Co.

Clerk's No. L.
New York Co. Register's No. 3043.
King's Co. Clerk's No. 3.
King's Co. Register's No. 3019.
My commission expires March 30, 1923.

No. 26636, Series B. (Form 1).

State of New York,
County of New York,—ss.

I, James A. Donegan, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a court of record, do hereby certify, that Catherine Tague, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a notary public in and for such county, duly commissioned and sworn, and authorized by the laws of said state, to take depositions and to administer oaths to be used in my court of said State and for general purposes: and also to take acknowledgments and proofs of deeds, of conveyances for

land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 24 day of Nov. 1922.

[Seal] JAMES A. DONEGAN,
Clerk.

Filed Dec. 27, 1922. C. R. Garlow, Clerk. [22]

THEREAFTER, on January 4, 1923, a letter from defendant's counsel stating defendant would not resist the granting of preliminary injunction, was filed herein, being in the words and figures following, to wit: [23]

Letter Dated December 26, 1922—Johnston, Coleman & Johnston to George F. Shelton.

W. M. Johnston H. J. Coleman J. H. Johnston.
JOHNSTON, COLEMAN and JOHNSTON.
Lawyers,
Electric Building, Billings, Montana.

December 26, 1922.

Mr. George F. Shelton, Attorney at Law,
Butte, Montana.

Dear Sir:

Your favor of the 27th instant enclosing applica-

tion for injunction *pendente lite* and affidavit of Mr. Fleming in the case of Fleming vs. Montana Coal & Iron Company received.

We shall not resist the granting of the preliminary injunction.

Yours very truly,
JOHNSTON, COLEMAN & JOHNSTON.
By W. M. JOHNSTON.

WMJ–MH.

Filed January 4, 1923. C. R. Garlow, Clerk. [24]

THEREAFTER, on January 4, 1923, plaintiff's motion for injunction was heard and submitted to the Court, the record thereof being as follows, to wit:

In the District Court of the United States in and for the District of Montana.

No. 103.

HENRY S. FLEMING
vs.
MONTANA COAL & IRON COMPANY.

Motion for Injunction.

This cause was duly called up at this time, pursuant to notice heretofore given, on plaintiff's motion for an injunction *pendente lite,* Geo. F. Shelton, Esq., appearing for the plaintiff, and there being no appearance in behalf of defendant.

Thereupon Mr. Shelton filed and presented to the Court a letter received from counsel for defendant stating that the defendant does not resist the granting of a preliminary injunction, whereupon the matter was submitted to the Court and taken under advisement.

Entered in open court January 4, 1923.

C. R. GARLOW,
Clerk. [25]

THEREAFTER, on February 5, 1923, the Court filed its written decision denying injunction herein, which decision is in the words and figures following, to wit: [26]

In the District Court of the United States in and for the District of Montana.

No. 103.

FLEMING

vs.

MONTANA COAL & IRON CO.

Decision of Court Denying Injunction.

Owning some defendant's bonds, plaintiff seeks to enjoin its purchase in open market of any the issue. It appears the bonds are secured by a trust deed which provides that defendant will maintain a sinking fund of two to five cents per ton of coal by it mined; that whenever this fund amounts to $10,000, the trustee (Empire Trust Co.) shall solicit and purchase bonds offered at the lowest price but

not to exceed 105; that if offers do not suffice to exhaust the fund, to that end the trustee shall draw by lot, call and redeem bonds at 105; and that at any time defendant may draw by lot, call and redeem bonds at 105.

It further appears that defendant has been purchasing its bonds at par or less in open market, but it does not appear it has failed to perform its contract in respect to the sinking fund.

Plaintiff contends that the methods of redemption of the trust deed are exclusive, that therein he has a prospect of redemption of his bonds at 105 before maturity, and that defendant's open market purchases defeat this prospect and impair his right.

In so far as compulsory redemption prior to maturity is concerned, plaintiff is right; but this in no wise debars defendant from voluntary redemption, that is, from purchasing in open market or private sale any bonds that the owners are willing to sell.

It is very clear that this right of purchase is not of the terms of and is unaffected by the trust deed, —has not been bartered away. Plaintiff has no ground for complaint.

Indeed, it is to plaintiff's advantage that surplus funds are devoted to decrease the bond debt instead of to increase dividends. For thus (apologies to Monsieur Coué) from day to day in every way his security is getting better and better. Nor is it material that defendant does not resist injunction, for injunction is an extraordinary remedy [27]

not to be made ordinary and so abused merely because unresisted.

Denied.

Feb. 5, 1923.

BOURQUIN, J.

Filed Feb. 5, 1923. C. R. Garlow, Clerk. [28]

THEREAFTER, on February 16, 1923, plaintiff's bill of exceptions was duly signed, settled and allowed and filed herein, being in the words and figures following, to wit: [29]

In the District Court of the United States for the District of Montana.

No. 103.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Corporation),

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that in the above-entitled action the plaintiff filed his bill of equity on the 28th day of November, 1922, in words and figures as follows, to wit: (Clerk will here insert copy of bills).

That thereafter on the 27th day of December, 1922, the plaintiff served upon Johnston, Coleman &

Johnston, attorneys for defendant, his notice of motion for an injunction *pendente lite* in accordance with the prayer of the complaint; which said notice of motion together with the affidavit of service thereon was as follows: (Clerk will here insert notice of motion for injunction *pendente lite* and affidavit of service).

That thereafter on the —— day of January, 1923, Johnston, Coleman and Johnston, attorneys for defendant, acknowledged receipt of notice of motion for injunction *pendente lite* and notified counsel for plaintiff that the defendant did not intend to resist the application; which said letter and acknowledgment is in words and figures following: (Clerk will here insert letter).

That on the 4th day of January, 1923, the said motion for injunction *pendente lite* came on for hearing before the Court pursuant to the notice thereof.

That thereupon George F. Shelton appeared as attorney for the plaintiff and there was no appearance at said time for the defendant.

That thereupon counsel for plaintiff moved the Court for an injunction *pendente lite* pursuant to the prayer of the bill of complaint and thereupon introduced and there was filed in said cause upon said hearing the letter of Johnston, Coleman and Johnston, attorneys for defendant as above set forth;

That counsel for plaintiff also filed in said cause at said hearing the affidavit of Henry S. Fleming upon the application for a preliminary injunction,

which said affidavit was duly filed in said cause on said 4th day of January, 1923, a copy of which said affidavit is as follows to wit: (Clerk will here insert copy of affidavit of Henry S. Fleming). [30]

That thereupon, the said motion was submitted to the Court upon said bill of complaint the affidavit of Henry S. Fleming and the said letter of Johnston, Coleman and Johnston, attorneys for the defendant.

The hearing being closed the said application and motion were by the court taken under advisement.

That thereafter on the 5th day of February, 1923, the Court rendered its decision upon said application and motion, and thereupon denied the same, which said decision of the Court is in words and figures following, to wit:

Owning some defendant's bonds, plaintiff seeks to enjoin its purchase in open market of any the issue. It appears the bonds are secured by a trust deed which provided that defendant will maintain a sinking fund of two or five cents per ton of coal by it mined; that whenever this fund amounts to $10,000, the trustee (Empire Trust Co.) shall solicit and purchase such of the bonds offered at the lowest price but not to exceed 105; that if offers do not suffice to exhaust the fund to that end the trustee shall draw by lot, call and redeem bonds at 105; and that at any time defendant may draw by lot, call and redeem bonds at 105.

It further appears that defendant has been purchasing its bonds at par or less in open market,

but it does not appear it had failed to perform its contract in respect to the sinking fund.

Plaintiff contends that the methods of redemption of the trust deed are exclusive, that therein he has a prospect of redemption of his bonds at 105 before maturity, and that defendant's open market purchases defeat this prospect and impair his right. In so far as compulsory redemption prior to maturity is concerned, plaintiff is right; but this in no wise debars defendant from voluntary redemption, that is, from purchasing in open market or private sale any bonds that the owners are willing to sell. It is very clear that this right of purchase is not of the terms of and is unaffected by the trust deed,—has not been bartered away.

Plaintiff has no ground for complaint. Indeed it is to plaintiff's advantage that surplus funds are devoted to decrease the bond debt instead of to increase dividends.

For thus (apologies to Monsieur Coué) from day to day in every way his security is getting better and better. Nor is it material that defendant does not resist injunction, for injunction is an extraordinary remedy not to be made ordinary and so abused merely because unresisted.

Denied.

BOURQUIN, J.

Feb. 5, 1923.

To which ruling and decision of the Court the plaintiff duly excepted and now within the time allowed by the rules of the court presents this his bill of exceptions to the ruling and decision of the

Court as aforesaid and asks that the same may be settled, allowed and ordered filed in said suit. [31]

Now, on the 16th day of February, 1923, the said bill of exceptions of the said plaintiff having been duly examined by the undersigned Judge of said Court and found to be a true and correct bill of exceptions, it is hereby certified that the said bill of exceptions is a true and correct bill of exceptions and the same is ordered allowed and settled and filed in said cause.

Dated this 16th day of February, 1923.

BOURQUIN,
Judge.

Copy of the foregoing bill of exceptions served on me and service accepted this —— day of February, 1923.

_____,
Attorney for Defendant. [32]

State of Montana,
County of Silver Bow,—ss.

George F. Shelton, being first duly sworn, deposes and says that he is a citizen of the United States, and of the State of Montana, over 21 years of age, that he served the enclosed draft of bill of exceptions hereto attached on Johnston, Coleman & Johnston, attorneys for the defendant in the case of Henry S. Fleming vs. Montana Coal & Iron Company, a corporation, on the 9th day of February, 1923, by depositing in the United States Postoffice at Butte, Montana, a copy of said draft of bill of ex-

ceptions enclosed in a sealed envelope, addressed to Johnston, Coleman and Johnston, attorneys at law, Billings, Montana, upon which said envelope was affixed the requisite amount of United States postage stamps to entitle the same to be carried by the mail.

GEORGE F. SHELTON,
Attorney for Plaintiff.

Subscribed and sworn to before me this 9th day of Feb. 1923.

[Notarial Seal] L. D. BARRY,
Notary Public for the State of Montana Residing at Butte, Montana.

My commission expires December 8, 1925.

Filed February 16, 1923. C. R. Garlow, Clerk. [33]

THEREAFTER, on February 26, 1923, petition for appeal was filed herein in the words and figures following, to wit: [34]

In the District Court of the United States for the District of Montana.

HENRY S. FLEMING,
Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Corporation),
Defendant.

Petition for Appeal.

The above-named plaintiff conceiving himself aggrieved by the interlocutory order and decree made and entered on the 5th day of February, 1923, in the above-entitled cause refusing an injunction *pendente lite* in said cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith, and he prays that this appeal may be allowed and that the transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

GEORGE F. SHELTON,
FOLGER & ROCKWOOD,
Attorneys for Plaintiff.

Filed Feb. 26, 1923. C. R. Garlow, Clerk. [35]

THEREAFTER, on February 26, 1923, assignment of errors was duly filed herein in the words and figures following, to wit: [36]

In the District Court of the United States for the District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Corporation),

Defendant.

Assignment of Errors.

The plaintiff above named in this action in connection with his petition for appeal files the following assignment of errors upon which he will rely in the prosecution of the said appeal in the above-entitled cause from the interlocutory order and decree, refusing an injunction *pendente lite* in said cause, made and entered on the 5th day of February, 1923.

I.

The Court erred in refusing an injunction *pendente lite* in the above-entitled cause made upon the application of the plaintiff.

II.

The Court erred in holding and deciding that the methods of redemption of the bonds secured by the trust deed are not exclusive and that the plaintiff cannot complain because the defendant voluntarily purchases for redemption in open market or at private sale bonds that the owners are willing to sell and that the defendant has the right to purchase any bonds that it sees fit to purchase and this right is not affected by the trust deed or the terms thereof.

III.

The Court erred in holding and deciding that the plaintiff has no grounds for complaint and that it is for the plaintiff's advantage that the surplus funds of the defendant company be devoted to decrease the bond debt instead of to increase the dividends. [37]

IV.

The Court erred in holding and deciding that it is not material that the defendant does not and did not resist the Application for an Injunction and in effect consented thereto.

V.

The Court erred in holding and deciding as follows, to wit:

"Owning some defendant's bonds, plaintiff seeks to enjoin its purchase in open market of any the issue. It appears the bonds are secured by a trust deed which provided that defendant will maintain a sinking fund of two or five cents per ton of coal by it mined; that whenever this fund amounts to $10,000, the trustee (Empire Trust Co.) shall solicit and purchase such of the bonds offered at the lowest price but not to exceed 105; that if offers do not suffice to exhaust the fund to that end the trustee shall draw by lot, call and redeem bonds at 105; and that at any time defendant may draw by lot, call and redeem bonds at 105.

It further appears that defendant has been purchasing its bonds at par or less in open market, but it does not appear it had failed to perform its contract in respect to the sinking fund.

Plaintiff contends that the methods of redemption of the trust deed are exclusive, that therein he has a prospect of redemption of his bonds at 105 before maturity, and that defendant's open market purchases defeat this prospect and impair his right. In so far as compulsory redemption prior to maturity is concerned, plaintiff is right;

but this in no wise debars defendant from voluntary redemption, that is, from purchasing in open market or private sale any bonds that the owners are willing to sell. It is very clear that this right of purchase is not of the terms of and is unaffected by the trust deed,—has not been bartered away.

Plaintiff has no ground for complaint. Indeed it is to plaintiff's advantage that surplus funds are devoted to decrease the bond debt instead of to increase dividends.

For thus (apologies to Monsieur Coué) from day to day in every way his security is getting better and better. Nor is it material that defendant does not resist injunction, for injunction is an extraordinary remedy not to be made ordinary and so abused merely because unresisted."

WHEREFORE defendant prays that the interlocutory order of the Court denying the injunction applied for may be reversed.

GEORGE F. SHELTON,
FOLGER & ROCKWOOD,
Attorneys for Plaintiff.

Filed Feb. 26, 1923. C. R. Garlow, Clerk. [38]

THEREAFTER, on February, 26, 1923, order allowing appeal was filed and entered herein in the words and figures following, to wit: [39]

In the District Court of the United States for the District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Corporation),

Defendant.

Order Allowing Appeal.

On this 26th day of February, 1923, came the plaintiff by his attorneys and filed herein and presented to this court, his petition, praying for the allowance of an appeal and assignment of errors intended to be urged by him, praying also that the transcript of record and papers and proceedings upon which the order and decree herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof this Court does allow the appeal upon the defendant giving bond according to law in the sum of three hundred ($300.00) dollars.

BOURQUIN,
Judge.

Filed Feb. 26, 1923. C. R. Garlow, Clerk. [40]

THEREAFTER, on February 26, 1923, bond on appeal was duly filed herein, in the words and figures following, to wit: [41]

In the District Court of the United States for the District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Corporation),

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That Henry S. Fleming, as principal, and Aetna Casualty & Surety Company, of Hartford, Connecticut, as surety, are held and firmly bound unto the defendant in error, Montana Coal & Iron Company, a corporation, in the full and just sum of three hundred dollars ($300.00), to be paid to the said defendant, Montana Coal & Iron Company, a corporation, its certain attorneys, successors or assignees, to which payment well and truly to be made, we bind ourselves and our successors, jointly and separately, by these presents.

Sealed with our seals and dated this 26th day of February, 1923.

WHEREAS the above-named plaintiff has prosecuted an appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse the interlocutory order and decree made and entered in the District Court

of the United States for the District of Montana in the above-entitled cause refusing an injunction *pendente lite* in said cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff shall prosecute his said appeal with effect and answer all costs if he fail to make the said plea good; then the above obligation to be void otherwise to remain in full force and effect.

HENRY S. FLEMING,
By GEORGE F. SHELTON,
His Attorney.

AETNA CASUALTY & SURETY CO.,
By PAUL WOLCOTT,
Resident Vice-President.

[Seal] Attest: S. G. ZABEL,
Resident Asst. Sec.

Approved by:

BOURQUIN,
District Judge.

Filed Feb. 26, 1923. C. R. Garlow, Clerk. [42]

THEREAFTER, on February 26, 1923, citation on appeal duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [43]

In the District Court of the United States for the District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Corporation),

Defendant.

Citation on Appeal.

To Montana Coal & Iron Company (a Corporation), GREETINGS:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, in said Circuit, on the 28th day of March, next, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the United States District Court for the District of Montana, wherein Henry S. Fleming is appellant, and you are appellee, to show cause, if any there be, why the interlocutory order and decree made and entered against the said appellant as in the said order allowing said appeal mentioned should not be corrected and why justice should not be done to the parties in that behalf.

This 26th day of February, in the year of our Lord one thousand nine hundred and twenty-three

of the Independence of the United States of America the one hundred and forty-sixth (146) year.

BOURQUIN,
U. S. District Judge.

[Seal] Attest: C. R. GARLOW,
Clerk.
By L. R. Polglose,
Deputy.

I hereby this 10th day of March, 1923, accept due personal service of this citation on behalf of the Montana Coal & Iron Company, Appellee.

THOS. M. KEARNEY,
JOHNSTON, COLEMAN & JOHNSTON,
Attorneys for Appellee. [44]

[Endorsed]: In the District Court of the United States for the District of Montana. Henry S. Fleming, Plaintiff, vs. Montana Coal & Iron Company (a Corporation), Defendant. Citation on Appeal. Filed March 13, 1923. C. R. Garlow, Clerk. By L. R. Polglose, Deputy. [45]

THEREAFTER, on March 13, 1923, plaintiff's praecipe for transcript on appeal was filed herein in the words and figures following, to wit: [46]

In the District Court of the United States in and for the District of Montana.

HENRY S. FLEMING,
Appellant and Plaintiff,
vs.
MONTANA COAL & IRON COMPANY (a Corporation),
Appellee and Defendant.

Praecipe for Transcript of Record.

To the Clerk of the United States District Court for the District of Montana.

In preparing the copy of the record for transmission to the Circuit Court of Appeals for the Ninth Circuit, on appeal sued out and the citation issued on the application of Henry S. Fleming, plaintiff, please incorporate in the record copies of the following documents and papers, to wit: Bill of exceptions; order and decree refusing injunction *pendente lite;* petition for appeal; assignment of errors; order allowing appeal; bond and original citation.

GEORGE F. SHELTON,
FOLGER & ROCKWOOD,
Attorneys for Appellant and Plaintiff.

Copy received this 10th day of March, 1923.
JOHNSTON, COLEMAN & JOHNSTON,
THOS. M. KEARNEY,
Attorneys for Appellee and Defendant.

Filed March 13, 1923. C. R. Garlow, Clerk. [47]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Cir-

cuit, that the foregoing volume, consisting of 47 pages, numbered consecutively from 1 to 47, inclusive, is a full, true and correct transcript of the record and proceedings had in the within entitled cause, and of the whole thereof, required to be incorporated in the record on appeal therein by praecipe filed, as appears from the original records and files of said Court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of sixteen and 25/100 Dollars ($16.25), and have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 20th day of March, A. D. 1923.

[Seal] C. R. GARLOW,
Clerk. [48]

[Endorsed]: No. 3995. United States Circuit Court of Appeals for the Ninth Circuit. Henry S. Fleming, Appellant, vs. Montana Coal & Iron Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed March 23, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.